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NO. 941479

In the Supreme Court of the United States

OCTOBER TERM, 1994

ATLANTIC RICHFIELD COMPANY,
PETITIONER

V.

BRUCE BABBITT,
SECRETARY OF THE INTERIOR, ET AL.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI

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26pp

QUESTION PRESENTED

Whether 28 U.S.C. § 2415(a), which imposes a six-year statute of limitations upon "every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract, " applies to a claim asserted by the federal government for royalties under a mineral lease.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to the parties appearing in the caption of the case, the following were parties to the proceeding below:

Phillips Petroleum Company
United States Department of the Interior
United States Minerals Management Service
Gary Johnson, successor to Nick L. Kelly, in his capacity as Area Manager, Dallas Area Compliance Office, Minerals Management Service, United States Department of the Interior,
Cynthia Quarterman, successor to Barry Williamson, in her capacity as Acting Director, Minerals Management Service, United States Department of the Interior
Manuel L. Lujan, Jr., former Secretary of the United States Department of the Interior

The individual defendants were named only in their official capacities.

Atlantic Richfield Company has no parent company, and it has only the following non-wholly owned subsidiaries:

85819 Canada Limited
AAPSS93, Inc.
AAPSS94, Inc.
Agro Internacional, S. de R. L. de C.V.
Alyeska Pipeline Service Company
AM/PM Japan Co. Ltd.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT (continued)

Arco Chemical Company
ARCO Solar Nigeria Ltd.
Badger Pipeline Company
Black Lake Pipe Line Company
Blair Athol Coal Pty., Limited
Colonial Pipeline Company
Compania de Petroleo Ganso Azul, Ltda.
Cook Inlet Pipe Line Company
Dalrymple Bay Coal Terminal Pty., Ltd
Dixie Pipeline Company
East Heidelberg Salt Water Disposal Co.
East Texas Salt Water Disposal Co.
Iricon Agency Ltd.
Kenai Pipe Line Company
Kuparuk Transportation Capital Corp.
Kuparuk Transportation Company
Logan Aluminum Inc.
Lyondell Petrochemical Company
Olympic Pipe Line Company
Platts Pipe Line Company
Prince William Sound Oil Spill Response Corporation
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company
Vastar Resources, Inc.

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IN THE SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI
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FOR THE FIFTH CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI

Atlantic Richfield Company ("ARCO") respectfully cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App., 1a-11a) is reported at 22 F.3d 616. That court's supplemental opinion on rehearing concerning the statute of limitations issue (Pet. App., 124a-127a) is unreported, as are the opinion, orders, and judgment of the district court (Pet. App., 12a-70a). The opinion of the Interior Board of Land

Appeals (Pet. App., 98a-121a) is reported at 110 IBLA 232. The remaining agency orders at issue (Pet. App., 71a-97a) are unreported.

JURISDICTION

The court of appeals entered its initial judgment (Pet. App., 1a-11a) on June 10, 1994. The court thereafter granted rehearing and entered a modified judgment (Pet. App., 124a-127a) on September 7, 1994. A further petition for rehearing was denied on November 1, 1994 (Pet. App., 122a-123a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

ARCO relies upon Rule 12.3 in filing this cross-petition for a writ of certiorari. ARCO received the government's Petition for a Writ of Certiorari on February 6, 1995.

STATUTORY PROVISION INVOLVED

28 U.S.C.§ 2415(a) provides in pertinent part:

> Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later . . . .

STATEMENT

ARCO filed this suit to challenge four distinct but related Interior Department actions: a final decision issued by the Interior Board of Land Appeals ("IBLA") in August, 1989, and three Minerals Management Service ("MMS") orders issued in September, 1989. Through these administrative actions, Interior is demanding that ARCO recalculate and pay additional royalties dating back to 1980, using unpublished royalty-valuation criteria that Interior first developed internally in late 1984. The district court consolidated ARCO's case with three similar cases filed against Interior by Phillips Petroleum Company ("Phillips"). Jurisdiction in the district court was premised on 28 U.S.C. § 1331(a) and 43 U.S.C. § 1349(b).

The district court rendered a final judgment on cross-motions for summary judgment, and Phillips and ARCO both appealed to the Fifth Circuit Court of Appeals. In its original decision (Pet. App., 1a-11a), the Fifth Circuit held Interior could not lawfully apply new royalty-valuation criteria without first complying with the notice-and-comment requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(b). This decision was dispositive of ARCO's case. It was not, however, dispositive of two of Phillips' cases. Therefore, in a supplemental opinion on rehearing (Pet. App., 124a-127a), the Fifth Circuit additionally ruled on an alternative issue that both Phillips and ARCO had raised below — the question of whether the six-year statute of limitations of 28 U.S.C. § 2415(a) applies to bar untimely royalty claims asserted by Interior under federal mineral leases.

The Fifth Circuit held that the statute of limitations does not apply to Interior's royalty claims. Phillips filed a petition for a writ of certiorari with respect to this issue, which has been docketed in this Court under No. 94-1287. ARCO, having won its case on other grounds, was not aggrieved by the statute of limitations decision. It, therefore, did not file its own petition. As a member of the American Petroleum Institute, however, it will be filing an amicus curiae brief in support of Phillips' petition.

Interior likewise filed a petition for a writ of certiorari to seek review of the Fifth Circuit's decision on the APA issue. If the Court should grant the government's writ petition, and if it should reverse the Fifth Circuit's holding that Interior's actions against ARCO violated the APA, then ARCO would be aggrieved by the Fifth Circuit's ruling that Interior's royalty claims are not subject to the six-year statute of limitations of 28 U.S.C. § 2415(a). Accordingly, ARCO is cross-petitioning for a writ of certiorari with respect to this important issue.

28 U.S.C. § 2415(a) imposes a general six-year limitation on contract actions brought by the United States. A mineral lease undoubtedly is a contract, and the obligation to pay royalties clearly is a covenant under that contract. Nevertheless, the Fifth Circuit held that section 2415(a) does not apply to actions by Interior to collect royalties under its federal mineral leases.

According to the Fifth Circuit, Interior can issue administrative orders requiring lessees to pay additional royalties, impose penalties for a lessee's noncompliance with those orders, adjudicate the lessee's administrative

appeals of the orders, and even counterclaim in court for judicial enforcement of its orders if the lessee seeks judicial review, all without ever engaging in "an action for money damages" that would be barred by the six-year statute of limitations of section 2415(a).

Under this decision, there is no time limit whatsoever on Interior's ability to demand and enforce payment of additional royalties claimed to be due under federal mineral leases. The question presented is thus of critical importance to United States energy producers. Without the protection of a statute of limitations, their accounts are open forever, and they are forever vulnerable to government demands for payment of stale contractual obligations.

The Fifth Circuit's decision also is in direct conflict with decisions of the Tenth Circuit Court of Appeals, and it is in substantial conflict with decisions of the District of Columbia Circuit Court of Appeals. The Tenth Circuit previously has held that the running of the limitations period of section 2415(a) can be asserted as a defense to royalty demands by Interior in administrative proceedings or subsequent litigation. *See, e.g., Mesa Operating Ltd. Partnership v. Dep't of Interior,* 17 F.3d 1288, 1291 (10th Cir. 1994). In the Tenth Circuit, Interior's right to collect past royalties expires six years after the agency knew or reasonably should have known of the alleged underpayment. *See, e.g., Phillips Petroleum Co. v. Lujan,* 4 F.3d 858 (10th Cir. 1993). The District of Columbia Circuit similarly has rejected an argument that would have allowed the government to avoid a different but analogous statute of limitations by using administrative, instead of judicial pro-

cedures in the first instance. *3M Co. v. Browner,* 17 F.3d 1453 (D.C. Cir. 1994).

REASONS FOR GRANTING THE PETITION

ARCO adopts and incorporates by reference the petition for writ of certiorari filed by Phillips in *Phillips Petroleum Co. v. Johnson,* No. 94-1287. As shown there, this Court previously has recognized that statutes of limitation are "fundamental to a well-ordered judicial system." *Board of Regents v. Tomanio,* 446 U.S. 478, 487 (1980). This Court also previously has recognized that the statute of limitation provision at issue here, 28 U.S.C. § 2415(a), was enacted in order to "equalize[ ] the litigative opportunities between the government and private parties." *Crown Coat Front Co. v. United States,* 386 U.S. 503, 521 (1967). Because section 2415(a) concerns "Government litigation. . .that arises out of an activity which is very similar to commercial activity," "fairness and equity" require "that the law should provide a period of time within which the Government must bring suit on claims," as it does for the claims of private individuals. S. Rep. No. 1328, 89th Cong., 2d Sess., *reprinted in* 1966 U.S.C.C.A.N. 2502, 2503; H.R. Rep. No. 1534, 89th Cong., 2d Sess. (1966).

The Fifth Circuit's reading of section 2415 deprives federal mineral lessees, and possibly all government contractors, of the fairness and equity afforded private individuals. As a result of this decision, mineral lessees in the Fifth Circuit, the circuit where most federal oil and gas resources lie, will be forever subject to claims of Interior's auditors and bureaucrats without any time limitation whatsoever. To give the Interior *carte blanche* to collect

additional royalties years after the fact injects unnecessary uncertainty into an already volatile industry and is counterproductive for this nation's energy policy.

In addition, the Fifth Circuit's decision is in direct conflict with decisions of the Tenth Circuit, which adheres to the contrary view that section 2415(a) does in fact apply to Interior's royalty collection efforts. The decision also conflicts with the limitations decisions of other circuits, which have enforced Congress's intent to level the playing field between the government and private litigants.

A. The Fifth Circuit's Decision Conflicts With Decisions Of Other Circuits That Have Considered Section 2415(a).

The Fifth Circuit's decision creates a conflict between the two most important circuits for the administration of federal mineral leases. At present, the United States is subject to the statute of limitations provided in section 2415(a) when it attempts to collect past royalties in the Tenth Circuit, but not when it attempts to do the same thing in the Fifth Circuit. The Tenth Circuit has taken the view that, because "oil and gas leases are contracts," section 2415(a) is "the controlling statute of limitations" applicable to Interior's efforts to collect unpaid royalties. *Phillips Petroleum Co. v. Lujan*, 4 F.3d 858, 860 and n.1. (10th Cir. 1993).

The Tenth Circuit recently reaffirmed that "the statute of limitations commences to run in an action by the government to recover unpaid royalties from oil and gas leases when the government knew or should have known

about the deficiency." *Mesa Operating Ltd. Partnership v. Dep't of Interior,* 17 F.3d 1288, 1291 (10th Cir. 1994). Although the lessee in *Mesa* waived the defense, "the statute of limitations would have been a defense to payment" had it not been waived. *Id.*

The decision of the Fifth Circuit also conflicts with the decisions of other circuits interpreting federal statutes of limitation. The Fifth Circuit concluded that an action to enforce an administrative order to comply with a contractual royalty obligation by paying money is not "an action for money damages" within the meaning of section 2415(a). The Fifth Circuit based this conclusion on two grounds: (1) the government had not filed a "complaint," even when it filed a counterclaim seeking judicial enforcement of its orders to pay the additional royalties claimed to be due; and (2) the royalties that Interior sought to collect were not "compensatory" and thus were not "damages."

These conclusions conflict with the decisions of other courts of appeals, which have given a broader reading to the term "action for money damages" in section 2415(a). For example, in *United States v. Toro,* 981 F.2d 1045, 1047 (9th Cir. 1992), the court held that the government's motion to forfeit a bail bond was subject to the six-year limitation of section 2415(a), even though the government's claim was asserted by a motion filed within a pre-existing criminal action rather than in an independent lawsuit. Similarly, in *FDIC v. Bachman,* 894 F.2d 1233, 1237 (10th Cir. 1990), the government's claims "to enforce notes, guaranties, or other contracts" to pay money were held to be limited by section 2415(a). Section 2415(a) also has been applied to bar an action to recover a deficiency on a prom-

issory note, even though related equitable action to foreclose a mortgage was not barred. *United States v. Alvarado*, 5 F.3d 1425, 1428, 1430 (11th Cir. 1993); *United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1489-1490 (9th Cir. 1993). In these cases, the courts concluded that an action to collect a debt that is founded on a contract is not outside the scope of section 2415(a) simply because the action alternatively could be characterized as a request for a specific performance of a contractual obligation to pay money.[1]

The Fifth Circuit's decision that "[a]gency orders are . . . not barred by the limitations of Section 2415" also conflicts with decisions in other circuits. In *3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994), for example, the court held that the five-year statute of limitations for any "action, suit or proceeding" to enforce a civil penalty applied even to "civil penalty cases brought before agencies." *Id.* at 1455-56. The court rejected the argument that only judicial actions, suits or proceedings could be barred as untimely: "[G]iven the reasons why we have statutes of limitations, there is no discernible rationale for applying" a limitation when the "action or proceeding is brought in a court, but not when it is brought in an administrative agency." *Id.* at 1457.

This Court should resolve these conflicts since the

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[1] *See also United States v. Vanornum*, 912 F.2d 1023, 1025 (8th Cir. 1990) (applying section 2415(a) to an action to enforce loan guaranties); *United States v. Rollinson*, 866 F.2d 1463, 1465 (D.C. Cir.) (same), *cert. denied*, 493 U.S. 818 (1989); *United States v. Moore*, 968 F.2d 1099, 1101 (11th Cir. 1992) (an action to set aside a fraudulent conveyance is an action in quasi-contract and thus is covered by section 2415(a)).

conflicting opinions will make a lessee's liability for stale royalty obligations dependant upon the location of its suit, and the result will be unnecessary forum shopping.

B. Application Of The Statute of Limitations To Federal Royalty Collections Is A Question Of Exceptional And Recurring Importance.

Even if there were no conflict in the circuits, the question before the Court is of exceptional and recurring importance because it effectively removes all time limitations from government claims for the collection of mineral lease royalties and because it comes from the circuit where most leased oil and gas production takes place. The Fifth Circuit decision directly affects the holders of 24,000 producing and producible federal leases by depriving them of the "settled expectations" that stale royalty claims "will be barred." *Tomanio,* 446 U.S. at 487. That the issue is recurring is evidenced by the numerous cases in which it has been raised.[2]

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[2] *See, e.g., Atlantic Richfield Co. v. Lujan,* 811 F. Supp. 1520 (N.D. Okla, 1992; *Anadarko Petroleum Corp. v. Babbitt,* No. 3:92-CV-885-X (N.D. Tex. Sept. 23, 1993) (reviewing *Anadarko Petroleum Co.,* 122 IBLA 141 (1992)); *Enron Oil & Gas Co. v. Babbitt,* No. CV93-0980 (W.D. La.); *Amoco Production Co. v. Lujan,* Civil No. 92-3381 (E.D. La.); *Phillips Petroleum Co. v. Johnson,* No. 3:91-CV-1610-H (N.D. Tex.); *Phillips Petroleum Co. v. Kelly,* No. 3:89-CV-2670-H (N.D. Tex.); *Conoco, Inc. v. Lujan,* No. 3:89-CV-2551-G (N.D. Tex.); *ARCO Oil & Gas Co.,* 131 IBLA 299 (1994)' *Chevron U.S.A., Inc.,* 129 IBLA 151 (1994); *Texaco, Inc.,* 129 IBLA 46 (1994); *Marathon Oil Co.,* 128 IBLA 168 (1994); *BHP Petroleum (Americas) Inc.,* 124 IBLA 185 (1992); *Benson-Montin-Greer Drilling Corp.,* 123 IBLA 341 (1992); *Marathon Oil Co.,* 119 IBLA 345 (1991); *Mobil Exploration & Producing U.S., Inc.,* 119 IBLA 76 (1991); *Amoco Production Co.,* 114 IBLA 42 (1990); *Forest Oil Corp.,* 111 IBLA 284 (1989).

Moreover, the issue presented is a question of broad significance; that is, whether an agency, in the Interior Department or elsewhere, can avoid the limitations period of section 2415(a) simply by ordering the payment of disputed contract amounts administratively, waiting for judicial review to be sought and then counterclaiming to enforce the original order to pay. Under the Fifth Circuit's decision, no time limit applies at any stage of these proceedings. If exploited, this result could affect all persons doing business with the government.

C. The Fifth Circuit's Ruling That The United States May Collect Lease Royalties Without Any Time Limitation Is Erroneous.

The Fifth Circuit's decision gives the United States a limitless time to assert and enforce claims demanding the payment of royalties claimed to be due under federal mineral leases. This decision is erroneous. Section 2415(a) applies to every action "for money damages . . . which is founded upon any contract express or implied in law." The statute clearly encompasses an action to collect royalties alleged to be due under a mineral lease.

The Fifth Circuit erroneously concluded that an action to recover royalties is not an action for "money damages," relying on *Bowen v. Massachusetts*, 487 U.S. 879 (1988). In *Bowen*, this Court held that a state's action to enforce its alleged statutory entitlement to reimbursement for Medicaid services was not an action for "money damages." As the Court recognized, a state's suit to enforce the statute "is not a suit seeking money in *compensa-*

tion for the damage sustained by the failure of the Federal Government to pay as mandated; rather, it is a suit seeking to enforce the statutory mandate itself, which happens to be one for the payment of money." 487 U.S. at 900 (emphasis in original). In *Bowen*, this meant that the action for judicial review of an administrative decision was not relegated to the Claims Court, but came within the waiver of sovereign immunity in the APA. A wholly different issue is presented here. Moreover, the analysis used in *Bowen*, which involved enforcement of a statutory right, is distinguishable from this case, where the government seeks to recover damages for breach of a contract to pay royalties and where the issue is the applicability of a statute of limitations. *Bowen's* narrow reading of the term "money damages" should be confined to cases presenting circumstances similar to that case, and "should not be treated as a widely applicable, general rule for determination of the nature of the relief sought. " *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1513 (9th Cir. 1994).

Moreover, unlike the legislative history of the APA examined by this Court in *Bowen*, the structure and history of section 2415(a) indicates that Congress intended all contract actions to be actions for "money damages" within the six-year statute of limitations. The statute enumerates specific exceptions, such as contracts involving title to and possession of land. In all other circumstances, by enacting section 2415(a), Congress clearly desired to put private litigants on an equal footing with the government. *Crown Coat Front Co.*, 386 U.S. at 521 and n.14. A lessee who pays a disputed royalty and then sues for a refund is bound by a general limitations provision, 28 U.S.C. § 2401. It is difficult to understand why the govern-

ment, on the other hand, should have an unlimited time to pursue its remedies. Indeed, the legislative history of section 2415(a) dispels any doubt that an "action for money damages" under section 2415(a) includes an action to enforce the payment of a sum owed under a contract. *See*, S. Rep. No. 1328, 89th Cong., 2d Sess., *reprinted in* 1966 U.S.C.C.A.N., 2502; H.R. Rep. No. 1534, 89th Cong., 2d Sess. (1966).

The Fifth Circuit also erroneously concluded that neither administrative orders requiring the payment of past-due royalties nor a counterclaim seeking enforcement of such an order is an "action for money damages" because neither is initiated by the filing of a "complaint." The court relied on the language of 28 U.S.C. § 2415(a), which states that "every action for money damages" shall be barred unless the "complaint" is filed within six years. This overly technical construction of the statute leads to irrational results and is belied by the statutory language, the statute's legislative history, and even Interior's own prior construction of the statute as applying to mineral lease royalty demands.

Certainly, a "complaint" must be timely filed to stop the running of the limitations period. If it is not, however, under the plain language of the statute, every action — including administrative actions — thereafter will be barred. This common-sense construction finds consistent support in other provisions of the statute as well. For example, section 2415(a) provides a one-year savings provision which states that a complaint will be timely, even if filed more than six years after the government's right of action accrues, if it is filed "within one year after final decisions

have been rendered in applicable administrative proceedings required by contract or by law." Congress clearly did not view administrative proceedings as being beyond the purview of the statute. Rather, administrative proceedings were viewed as a predicate to, not a substitute for, judicial proceedings.

The express exception for administrative-offset actions in section 2415(i) likewise shows that administrative proceedings were intended to be "actions" barred by section 2415(a) — unless expressly exempt. Had Congress meant to bar only judicial actions commenced by the filing of a complaint, section 2415(i), creating an exception for administrative-offset actions, would not have been necessary. Similarly, if only complaints were barred, section 2415(f), which allows the assertion of time-barred claims by way of counterclaim or offset in certain circumstances, would not have been necessary.

The statute's legislative history similarly shows that *all* stale claims were intended to be barred — not simply those asserted in stale complaints. S. Rep. No. 1328, 89th cong., 2d Sess., *reprinted in* 1966 U.S.C.C.A.N. 2502; H.R. Rep. No. 1534, 89th Cong., 2d Sess. (1966).

Finally, Interior itself has consistently interpreted the statute as applying to federal royalty claims. For example, in a May 10, 1974 Memorandum, Interior's Assistant Solicitor concluded that a claim for federal royalties is a claim for money damages under a contract. The memo was circulated to the agency's various regional managers with the admonition that "[i]n view of the six-year statute of limitations, each Area Office should place as much em-

phasis as possible" on auditing, reviewing lease account balances, "demanding payments, and taking the necessary follow-up action. . . ." Similarly, a September 22, 1976 Memorandum, also authored by Interior's Assistant Solicitor, concluded that "[the statute's] practical effect is to preclude the Survey from billing . . . for royalties which accrued more than six years prior to the date of the billing."

The statutory language of section 2415(a), its legislative history and Interior's own prior construction of the statute all compel the same conclusion — that the Fifth Circuit was incorrect in holding that mineral lease royalty demands are exempt from the statute. To keep the government's mineral lessees forever subject to the risk that the government could demand additional royalties for any past period of production would have an adverse impact on this country's energy industry.

The Court should particularly grant this petition if it also takes up the Interior Department's petition on the Administrative Procedure Act issue. If the Court were to grant Interior's writ petition and reverse the Fifth Circuit's decision on the APA issue, but not grant ARCO similar relief on the statute of limitations issue, ARCO would be severely prejudiced. ARCO would be subject to the requirement that additional royalties be paid simply because it did not have the clairvoyance to foresee the royalty-valuation criteria that Interior would subsequently develop and retroactively apply. Moreover, under the Fifth Circuit's ruling, ARCO could be required to retroactively recalculate its royalties using these new criteria for all of its federal offshore leases, for each and every month, dating

back to the inception of these leases.

CONCLUSION

For all of the foregoing reasons, ARCO's Cross-Petition for a Writ of Certiorari should be granted.

Respectfully submitted:

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